

BEFORE THE HONORABLE ANTHONY J. BATTAGLIA, JUDGE PRESIDING

) CASE NO. 13-MD-02452-AJB

) SAN DIEGO, CALIFORNIA

) SEPTEMBER 10, 2014

) 10:20 A.M.

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SEPTEMBER 10, 2014

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SEPTEMBER 10, 2014

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**SAN DIEGO, CALIFORNIA; WEDNESDAY, SEPTEMBER 10, 2014; 10:20 AM**

**DEPUTY CLERK:** NUMBER ONE ON CALENDAR, CASE NUMBER 13MD2452, IN RE INCRETIN MIMETICS PRODUCTS LIABILITY LITIGATION, ON FOR DISCOVERY CONFERENCE.

**THE COURT:** ALL RIGHT. GOOD MORNING OR AFTERNOON, DEPENDING ON WHERE YOU ALL ARE. THIS IS JUDGE BATTAGLIA, THAT IS GOING TO PRESIDING OVER THE HEARING TODAY.

WE DIDN'T, I DON'T THINK, GET A LIST OF ATTENDEES. SO WHY DON'T WE, STARTING WITH THE PLAINTIFFS, HAVE YOU IDENTIFY YOURSELVES SLOWLY, SPELLING THE LAST NAMES SO THE REPORTER CAN COMPLETE THE RECORD. SO IN NO PARTICULAR ORDER, SOMEBODY GO FIRST ON THE PLAINTIFFS' SIDE.

**MR. JOHNSON:** GOOD MORNING, YOUR HONOR. THIS IS MIKE JOHNSON.

**THE COURT:** OKAY. AND WHO ELSE?

**MR. SHKOLNIK:** GOOD MORNING, YOUR HONOR. THIS IS HUNTER SHKOLNIK.

**THE COURT:** OKAY. THANKS, MR. SHKOLNIK.

NEXT, IF ANYONE.

**MR. KENNERLY:** GOOD MORNING, YOUR HONOR. THIS IS MAX KENNERLY, K-E-N-N-E-R-L-Y.

**THE COURT:** ALL RIGHT. THANKS.

NEXT.

**MR. THOMPSON:** RYAN THOMPSON FOR THE PLAINTIFF.

**MS. BLATT:** GAYLE BLATT --

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1           **THE COURT:** I HAVE MR. THOMPSON DOWN. I THINK I  
2 HEARD MS. BLATT, BUT CONFIRM THAT ONE WAY OR ANOTHER.

3           **MS. BLATT:** YES, YOUR HONOR. GAYLE BLATT.

4           **THE COURT:** THANK YOU. AND ANYBODY ELSE? IT LOOKS  
5 LIKE NOT.

6 (PHONE CUTS OUT)

7           **THE COURT:** TRY THAT AGAIN.

8           **MR. HOERMAN:** GOOD MORNING, JUDGE. TOR HOERMAN FOR  
9 THE PLAINTIFFS. HERE WITH ME IS CHAD FINLEY.

10          **THE COURT:** MR. HOERMAN AND THEN MR. FINLEY.

11          **MR. PLATTENBERGER:** GOOD MORNING, YOUR HONOR. JACOB  
12 PLATTENBERGER FOR THE PLAINTIFFS.

13          **THE COURT:** GOT YOU. WHO ELSE?

14          **MR. JOHNSON:** I THINK THAT IS IT FOR PLAINTIFFS, YOUR  
15 HONOR.

16          **THE COURT:** GREAT. LET'S GO TO THE DEFENSE SIDE OF  
17 THE CALL AND GIVE US YOUR NAME AND THE PARTY YOU REPRESENT.

18          **MS. REYES:** GOOD MORNING, YOUR HONOR. THIS IS ANA  
19 REYES FOR MERCK.

20          **THE COURT:** OKAY. THANK YOU.

21          **MR. KING:** GOOD MORNING, YOUR HONOR. KENNETH KING  
22 FOR ELI LILLY AND COMPANY.

23          **THE COURT:** THANKS, MR. KING.

24          **MS. LEVINE:** YOUR HONOR, THIS IS HEIDI LEVINE AND  
25 CHRISTOPHER YOUNG ON BEHALF OF NOVO NORDISK.

1           **THE COURT:** FOR NOVO MS. LEVINE AND CHRIS --

2           **MS. LEVINE:** YOUNG.

3           **THE COURT:** THANK YOU.

4           **MR. THOEN:** THIS IS ALLAN THOEN, T-H-O-E-N, FOR ELI  
5 LILLY.

6           **THE COURT:** THANK YOU. ANYBODY ELSE?

7           **MS. LAURENDEAU:** GOOD MORNING, YOUR HONOR. AMY  
8 LAURENDEAU, L-A-U-R-E-N-D-E-A-U, FOR AMYLIN PHARMACEUTICALS.

9           **THE COURT:** THANKS. ANYBODY ELSE? SOUNDS LIKE NOT.  
10           SO THIS IS A DISCOVERY CONFERENCE ADDRESSING ISSUES,  
11 ESSENTIALLY, IN THE FORM OF A MOTION TO COMPEL AGAINST  
12 DEFENDANTS, WITH REGARD TO ANALYSES OF CAUSAL ASSOCIATION.  
13 THAT IS HOW THE DOCUMENTS ARE ENTITLED.

14           IT RELATES SPECIFICALLY, AS I CAN TELL FROM REVIEWING  
15 ALL THE PAPERWORK, TO INTERROGATORIES 25 AND 26, AND DOCUMENT  
16 REQUESTS 43, 44, 45, 47, 50, 52, 57 AND 58.

17           ALL OF THESE DOCUMENT REQUESTS/INTERROGATORIES ARE  
18 INTERRELATED WITH REGARD TO DISCOVERY REGARDING CAUSAL  
19 CONNECTION BETWEEN THE DEFENDANTS PHARMACEUTICALS AND  
20 PANCREATIC CANCER.

21           AND HAVING READ THE DOCUMENTS, I AM WELL-VERSED IN  
22 WHERE YOU ARE AT THE MOMENT. BUT AS I PROMISED IN THE  
23 DISCOVERY PROTOCOL, I WOULD ENTERTAIN THE PLAINTIFFS GIVING ME  
24 SOMETHING IN THE WAY OF A REPLY, IF THERE IS ANYTHING THEY WANT  
25 TO ADD. AND CERTAINLY THE DEFENSE CAN WEIGH IN ON THE NEW

1 MATTER IF IT'S ADDRESSED BY WAY OF REPLY.

2 AND WHEN YOU FOLKS SPEAK, TO THE EXTENT THAT YOU ARE  
3 SHARING SOME OF THE DUTIES, MAKE SURE TO REIDENTIFY YOURSELF BY  
4 NAME AND THEN COMMENT. SO WHO WANTS TO SPEAK FIRST ON BEHALF  
5 OF THE PLAINTIFFS IN THE NATURE OF A REPLY OR FURTHER COMMENT?

6 **MR. KENNERLY:** YOUR HONOR, THIS IS MAX KENNERLY. I  
7 WILL BE DOING THE BULK OF THE RESPONSE HERE.

8 **THE COURT:** OKAY. GO AHEAD.

9 **MR. KENNERLY:** THERE IS FIVE TOPICS I WANT TO COVER,  
10 AND UNDERSTANDING THAT THE COURT DOES NOT WANT TO HEAR ANYTHING  
11 REITERATED THAT IS IN THE BRIEF.

12 THE FIRST IS WHAT IT IS THAT WE WANT DEFENDANTS TO  
13 DO. AND AS WE READ DEFENDANTS' RESPONSE, THERE IS A NUMBER OF  
14 ARGUMENTS ABOUT HOW DEFENDANTS ARE NOT OBLIGATED TO GO THROUGH  
15 THEIR OWN CUSTODIAL PRODUCTION TO FIND RELEVANT DOCUMENTS FOR  
16 US.

17 WE AGREE WITH THAT. THAT'S NOT WHAT WE'RE ASKING  
18 THEM TO DO. WE'RE NOT ASKING THEM TO DO AN INDEPENDENT SEARCH  
19 OF THE NDA OR ANYTHING ELSE LIKE THAT. WHAT WE'RE ASKING THEM  
20 TO DO IS TO GO BACK, SPEAK WITH KNOWLEDGEABLE EMPLOYEES,  
21 PRESENT THEM WITH THE REQUESTS -- OR SOME, YOU KNOW,  
22 LAWYER-STREAMLINED VERSION OF THE REQUESTS, ASK THEM WHAT  
23 INFORMATION THEY KNOW, WHAT DOCUMENTS THEY HAVE, AND THEN  
24 REPORT THAT BACK IN DISCOVERY. SO IN MANY WAYS IT'S KIND OF  
25 TALKING BACK AND FORTH ON TWO SIDES.

1           MOVING TO THE SECOND ISSUE. THE DEFENDANTS' RESPONSE  
2       SAYS THAT THIS IS NOT A MOTION ABOUT, QUOTE, MISSING DISCOVERY,  
3       CLOSE QUOTE. AND THIS GOES BACK TO WHAT IT IS THAT WE'RE  
4       ASKING THEM TO DO.

5           IT IS ABOUT MISSING DISCOVERY. MERCK, IN ITS  
6       RESPONSE, TALKED ABOUT THE PRODUCT DEVELOPMENT TEAM, ABOUT THE  
7       SAFETY REVIEW COMMITTEE, AND ABOUT THE RISK MANAGEMENT SAFETY  
8       TEAM.

9           THE REFERENCE THEY GIVE -- THIS IS A SMALL STACK OF  
10      DOCUMENTS; AT LEAST SMALL COMPARED TO THE OVERALL PICTURE.  
11      IT'S ABOUT 21,000 PAGES, THE BATES RANGE THAT THEY HAVE THERE.  
12      THIS WAS DUMPED ON US, BUT THEN THERE IS A REFERENCE IN THE  
13      DISCOVERY RESPONSES TO THESE 21,000 PAGES OF BATES NUMBERS.

14           LOOKING THROUGH THAT, WE CAN'T FIND ANY RISK  
15      MANAGEMENT SAFETY TEAM MINUTES ANYWHERE IN IT. AND THAT WOULD  
16      BE YOUR PRIMARY FRONT LINE, WHERE YOUR ACTUAL SCIENTISTS AT  
17      MERCK START LOOKING AT THE CAUSAL EVIDENCE HERE.

18           WHAT ARE THEY EVALUATING? WHAT ARE THEY DOING  
19      CONCERNING THIS ISSUE? WHAT SCIENTIFIC EVIDENCE IS BEING  
20      PRESENTED IN FRONT OF THEM?

21           AND THAT KIND OF RAISES A LOT OF QUESTIONS TO US  
22      ABOUT WHERE DID THIS COME FROM. OUR BEST GUESS IS THAT THE  
23      DOCUMENTS IN THOSE 21,000 PAGES ARE PULLED FROM SHAREPOINT, ONE  
24      OF THEIR DOCUMENT SERVERS THAT KIND OF HAPHAZARDLY COLLECTS  
25      DOCUMENTS ONE WAY OR THE OTHER.



1 BUT THE PROBLEM HERE IS NONE OF THAT HAS ANY RHYME OR  
2 REASON TO IT. AND WE HAVE NO ASSURANCE THAT IT'S ACTUALLY ALL  
3 OF THE DOCUMENTS. WE HAVE NO ASSURANCE THAT IT REFLECTS THE  
4 KNOWLEDGE OF THE EMPLOYEES. AND WE DON'T KNOW IF IT'S BEEN  
5 CHERRYPICKED, WHAT'S IN THERE.

6 AND THAT IS WHY THERE ARE THREE DIFFERENT GROUPS OF  
7 DOCUMENTS THAT SHOULD BE IN A PRODUCTION LIKE THAT, THAT WE  
8 CAN'T FIND. AND THEN WE THINK THAT THESE WOULD BE READILY  
9 ACCESSIBLE. IF YOU SIMPLY PRESENTED THIS TO MANY OF THE SAFETY  
10 PEOPLE IDENTIFIED AS CUSTODIANS -- AND ANYONE ELSE WITH  
11 KNOWLEDGE OF IT -- YOU'D GET THESE THREE GROUPS OF DOCUMENTS.

12 AND THIS, AGAIN, IS NOT ANYTHING THE DEFENDANTS HAVE  
13 HELPED US WITH. THIS IS WHAT, THROUGH OUR OWN COMBING BACK AND  
14 FORTH, REALLY SHOULD JUMP OUT. AND THE FIRST IS THE RISK  
15 MANAGEMENT SAFETY TEAM MINUTES, THE FACT THAT THERE ARE NO  
16 MINUTES FROM THE DOCUMENT RANGE THERE. IT INDICATES TO US THAT  
17 THEY'VE NEVER BEEN THERE.

18 THE SECOND ARE THE SIGNAL DETECTION REPORTS.

19 **THE COURT:** I'M SORRY. SAY THAT AGAIN? THE WHAT?

20 **MR. KENNERLY:** THE SIGNAL DETECTION REPORTS.

21 BASIC PHARMACOVIGILANCE, YOU LOOK FOR SAFETY SIGNALS  
22 ROUTINELY. WE CAN'T FIND ANYTHING FROM BEFORE 2012 IN THAT  
23 PILE OF DOCUMENTS, OR REALLY SEARCHING ACROSS EVERYTHING. THE  
24 BIGGEST PICTURE ANALYSIS THAT GOES TO THE FDA IS THE POOLED  
25 SAFETY ANALYSIS. AND FROM WHAT'S ALREADY BEEN IN FRONT OF THE

1 COURT IS THIS LAW REFERENCE TO HOW YOU HAVE TO DO A  
2 COMPREHENSIVE VIEW OF SAFETY, YOU HAVE TO DO A POOL, YOU HAVE  
3 TO DO AN AGGREGATE, ALL THOSE TYPES OF TERMS TO BRING  
4 EVERYTHING TOGETHER.

5 WE HAVE THE POOLED SAFETY ANALYSIS THAT THEY PRESENT  
6 TO THE FDA, BUT WE DON'T HAVE ANY OF THE STATISTICAL ANALYSIS  
7 UNDERNEATH IT.

8 WE HAVE SUBSEQUENT CONCLUSIONS, BUT WHAT THE  
9 EPIDEMIOLOGISTS THEMSELVES WOULD HAVE COME UP WITH, WHAT THEY  
10 WOULD HAVE REVIEWED, ARE NOT THERE. THAT PRESENTS ITS OWN  
11 PROBLEM OF OUR EXPERTS ARE HOBBLLED BY IT, NOWHERE TO EVEN START  
12 TO LOOK INTO HOW MERCK HAS DEALT WITH ANY OF THIS, TO LOOK AT  
13 HOW ANY OF THIS DATA HAS BEEN USED AT THE COMPANY.

14 AND WE ALREADY SEE PROBLEMS IN IT. ONE OF THEM IS IN  
15 THEIR STATISTICAL ANALYSIS, IT LOOKS LIKE THEY'VE POOLED  
16 TOGETHER NEOPLASMS ACROSS ALL ORGANS, WHICH SCIENTIFICALLY WE  
17 SEE NO REASON WHY YOU'D DO THAT. YOU LOOK AT WHERE YOU MIGHT  
18 BE DEVELOPING NEOPLASMS IN A PARTICULAR ORGAN.

19 WE'VE ALSO SEEN -- IT LOOKS LIKE THE POOLED SAFETY  
20 ANALYSIS WAS BASED ON ALL OF THE PANCREATIC CANCER EVENTS IN 25  
21 OF THE CLINICAL TRIALS. THAT IS NOWHERE NEAR THE AMOUNT THAT  
22 SHOULD BE IN THERE. I MEAN, IN THEORY YOU COULD PUT IT WITH  
23 OVER A HUNDRED CLINICAL TRIALS, BUT AT LEAST 40 OR MORE OF  
24 THOSE TRIALS HAVE SUFFICIENT DATA THAT IT SHOULD GO INTO A  
25 POOLED SAFETY ANALYSIS.

1           AND AGAIN, IT'S NOT A MATTER THE DEFENDANTS NEED TO  
2 EXPLAIN IN DETAIL OFF OF THIS. THEY WOULD HAVE THIS. IF YOU  
3 ASKED AN EPIDEMIOLOGIST AT MERCK WHERE'S THE STATISTICAL REPORT  
4 FOR THE POOLED SAFETY ANALYSIS, THEY'D PROBABLY BE ABLE TO PULL  
5 IT RIGHT OFF THE SHELF. SO IT IS ABOUT MISSING DISCOVERY. WE  
6 DON'T KNOW WHAT CAUSAL DOCUMENTS WE HAVE. IT LOOKS LIKE WE  
7 HAVE A HAPHAZARD FILM FROM THEIR SHAREPOINT, BUT IT DOESN'T  
8 MEAN THAT MERCK HAS EVER SAT DOWN, ASKED THE RELEVANT PEOPLE:  
9 WHAT DO YOU KNOW ABOUT THE CAUSAL ANALYSIS IN GIVING US THE  
10 MINUTES, THE SIGNAL DETECTION REPORTS, AND THE ANALYSES  
11 UNDERLYING THE POOLED SAFETY ANALYSIS?

12           MOVING TO THE THIRD TOPIC, IN ITS RESPONSE, MERCK  
13 REFERENCES -- I THINK ON PAGE FOUR -- THAT THEY GAVE A TARGET  
14 RESPONSE ABOUT FDA INFORMATION. AND I SENT DEFENSE COUNSEL AN  
15 E-MAIL RIGHT AFTER THEY FILED IT. AND THEY PROMPTLY GOT BACK  
16 TO ME AND SAID THEY WERE TALKING ABOUT INTERROGATORY 34, WHICH  
17 IS NOT PART OF THIS.

18           AND THAT KIND OF GIVES US A TEMPLATE AS REALLY WHAT  
19 WE'RE LOOKING FOR. BECAUSE IN RESPONSE TO INTERROGATORY 34,  
20 WHICH ASKS ABOUT COMMUNICATIONS WITH THE FDA RELATING TO THE  
21 2014 ANALYSIS, MERCK'S RESPONSE WAS WE WENT, WE TALKED WITH OUR  
22 CUSTODIAN, WE TALKED WITH LOU ANN EADER.

23           LOU ANN EADER WAS ABLE TO PROVIDE TO US AN E-MAIL THE  
24 FDA SENT HER IN AUGUST, AND A RESPONSE THAT MERCK SENT BACK IN  
25 NOVEMBER. THAT'S WHAT WE'RE ASKING FOR: LET'S JUST TALK TO

1 PEOPLE AND GET A RESPONSE BACK TO US.

2 BUT THAT KIND OF WEIGHS IN IN ITS OWN GLOBAL ISSUE AS  
3 TO WHY THIS IS ALL SO IMPORTANT, THAT MERCK TALK TO ITS  
4 EMPLOYEES AND GIVE US INFORMATION BACK. THAT IS VERY  
5 PERTINENT, THAT COMMUNICATION BACK AND FORTH.

6 AND ON SPREADSHEETS THAT MERCK PROVIDES TO THE FDA,  
7 TALKING ABOUT SOME OF THEIR CLINICAL TRIALS IN PANCREATIC  
8 CANCER, VERY CRITICAL INFORMATION. THIS HAPPENS BACK IN AUGUST  
9 AND NOVEMBER. MERCK DOES NOT IDENTIFY THIS COMMUNICATION WITH  
10 THE FDA RIGHT IN THE SUBJECT OF THIS ENTIRE LITIGATION UNTIL  
11 JUNE 30TH. THAT IS THE FIRST RESPONSE THAT EVER REFERENCES  
12 ANYTHING BACK AND FORTH OF THIS.

13 SO WE FOUND THIS BECAUSE WE GET THE DOCUMENTS THAT  
14 SHOWS THIS IN APRIL 2014. AND AGAIN, THERE IS A SIX-MONTH  
15 DELAY FROM WHEN MERCK HAD THIS IN THEIR HAND, DIRECTLY RELEVANT  
16 TO EVERYTHING, TO WHEN THEY PHYSICALLY PRODUCED IT TO US.

17 THEY DON'T PRODUCE IT TO US AND SAY LOOK AT THIS  
18 DOCUMENT BACK AND FORTH TO THE FDA. THEY DUMP IT IN THE MIDDLE  
19 OF AN ESI REQUEST GOING THROUGH THE IND AND THE NDA. AND FOR  
20 WHATEVER REASON, IT'S ONLY IN THE NDA FOR JANUMET. IT'S NOT  
21 EVEN IN THE JANUVIA NDA.

22 WE FOUND THIS ON OUR OWN, DOING THESE FISHING  
23 SEARCHES ACROSS EVERYTHING. WHEN IF YOU JUST ASK LOU ANN  
24 EADER: HAVE YOU BEEN TALKING WITH THE FDA ABOUT PANCREATIC  
25 CANCER, SHE WOULD HAVE SAID THIS IMMEDIATELY.

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1           AND SHE DID, WHENEVER IT WAS THAT MERCK TALKED TO  
2 HER, BUT WE DON'T HEAR THIS UNTIL JUNE 30TH. SO THIS IS WHAT  
3 WE WANT. WE'D LIKE IT A LITTLE BIT FASTER. WE'D LIKE IT A  
4 LITTLE BIT MORE THOROUGH, BUT THEY JUST NEED TO TALK WITH THE  
5 CUSTODIANS AND SEE WHAT THE CUSTODIANS TELL US, OR ANY OTHER  
6 KNOWLEDGEABLE EMPLOYEE, AND RECORD IT TO US.

7           **THE COURT:** WOULD YOU TELL ME, IS IT LOU ANN EADER?  
8 COULD YOU SPELL THAT?

9           **MR. KENNERLY:** EADER, E-A-D-E-R.

10          **THE COURT:** OKAY. GO AHEAD.

11          **MR. KENNERLY:** THE FOURTH ISSUE RELATES TO RAW DATA.  
12 AT THIS ISN'T A MOTION ABOUT RAW DATA, BUT IT REFLECTS WHY WE  
13 NEED SOME GUIDANCE FROM THE COURT ON HOW MUCH THE COMPANY NEEDS  
14 TO TELL US.

15               THE PRIMARY DISCOVERY THEY HAVE GIVEN US ARE THESE  
16 LARGE SPREADSHEETS THAT REFLECT CLINICAL TRIALS AND NONCLINICAL  
17 TRIALS AND NONCLINICAL STUDIES THAT WERE DONE RELATING TO THESE  
18 DRUGS. WE DON'T HAVE THE RAW DATA OFF OF THEM. WE WERE GIVEN  
19 THE OPTION TO START REQUESTING THE RAW DATA. WE'VE BEEN  
20 MEETING AND CONFERRING ON THAT FOR SOME TIME. AND, ACTUALLY,  
21 WITH REGARD TO MERCK, WE ARE GOING TO HAVE A REQUEST FOR THEM  
22 EITHER TODAY OR TOMORROW.

23               THE PROBLEM WITH THAT IS THAT'S ITS OWN VERY ARDUOUS  
24 PROCESS. THE SPREADSHEETS DO NOT POINT US TO WHAT HAS  
25 PANCREATIC CANCER DATA. THEY DO NOT POINT US TO WHERE THEY'VE

1 SEEN PANCREATIC CANCER EVENTS.

2 SO WE HAVE TO COMB THROUGH THESE AS BEST WE CAN. WE  
3 HAVE TO DIG OUT THE PROTOCOLS, WE HAVE TO TALK WITH THEIR  
4 EXPERTS, AND THEN GO BACK AND FORTH TO MERCK AND SAY, OKAY,  
5 WELL MAYBE THERE IS RAW DATA IN THIS ONE, MAYBE THERE IS RAW  
6 DATA IN THAT ONE.

7 IF WE HAD THESE SORTS OF ANALYSES THEY THEMSELVES  
8 HAVE BEEN PERFORMING, THIS WOULD BE MUCH SIMPLER. AND WHAT  
9 WE'RE GOING TO RUN INTO AT THESE DEPOSITIONS IS THE FIRST ROUND  
10 OF THE DEPOSITION IS GOING TO BE A BASIC, WELL, WE HAVE TO FIND  
11 THESE DOCUMENTS, DO YOU RECALL THE DOCUMENTS, DO YOU KNOW OF  
12 ANY DOCUMENTS.

13 IT SHOULDN'T BE THAT WAY. WE SHOULD HAVE IT  
14 STREAMLINED. THE CORPORATION SHOULD HAVE RESPONDED BEFORE AND  
15 TOLD US THESE THINGS THAT IT KNOWS OF. NOT EVERY DOCUMENT, BUT  
16 EVERY DOCUMENT IT KNOWS OF, THAT THEY NEED TO KNOW OF, AND THEN  
17 WE CAN GET TO THE SUBSTANCE OF THIS CASE.

18 THE LAST ISSUE -- I DON'T KNOW IF THE COURT EVEN  
19 WANTS TO GO INTO IT -- IS ABOUT WHAT OCCURS AT THE MEET AND  
20 CONFERS.

21 **THE COURT:** NO, I DON'T. I DON'T WANT TO HEAR ABOUT  
22 THE LAWYER-BASHING ARGUMENTS BACK AND FORTH. I MADE THAT  
23 CLEAR. THIS IS SUPPOSED TO BE A SIMPLIFIED PROCEDURE AND,  
24 FRANKLY, I'M GIVING A SERIOUS THOUGHT OF JUST SENDING YOU BACK  
25 TO JUDGE DEMBIN AND LETTING HIM DEAL WITH THIS BECAUSE I ASKED

1 FOR A BRIEF SUMMARY THAT YOU DID MEET AND CONFER. WHAT I GET  
2 IS FOUR PAGES OF WHAT EVERYBODY IS DOING TO EVERYBODY ELSE. I  
3 REALLY WANT TO MOVE THIS CASE ALONG. AND I DON'T KNOW WHAT  
4 DISTRICTS YOU ALL PRACTICE IN, BUT THIS IS THE SIXTH BUSIEST  
5 DISTRICT IN THE UNITED STATES. IT IS HIGHLY UNUSUAL FOR A  
6 DISTRICT JUDGE TO GET INVOLVED IN DISCOVERY, AND I'M STARTING  
7 TO REGRET THAT I SAID I WOULD DO IT.

8 YOU GUYS NEED TO GET TO THE POINT AND GET MOVING OR  
9 I'LL SEND YOU BACK TO JUDGE DEMBIN, AND HE CAN SPEND HIS TIME  
10 WITH YOU. HE HAS MORE TIME THAN I DO, FRANKLY. SO DON'T GIVE  
11 ME THE MISDEEDS OF COUNSEL. IT'S JUST NOT GOING TO GO  
12 ANYWHERE. IT'S NOT FLATTERING TO ANY OF YOU TO KEEP GOING BACK  
13 TO WELL, THEY'RE HIDING STUFF, THEY'RE BEING EVASIVE, AND  
14 THEY'RE DELAYING IN THEIR APPROACH AND OBFUSCATING ALL OF THIS.

15 JUST GET OVER IT. LET'S GET DOWN TO WHAT IT IS YOU  
16 WANT, WHY IT'S RELEVANT, AND THEN I WILL FASHION A RELIEF. IF  
17 YOU WANT TO PLAY THE GAME OF LAWYER-BASHING, YOU CAN GO SEE  
18 JUDGE DEMBIN. SO THAT'S MY INSIGHT ON THAT CATEGORY. SO THAT  
19 ONE WE'RE NOT GOING TO GO FURTHER WITH.

20 IS THERE ANYTHING ELSE ON THE PLAINTIFFS' SIDE ON  
21 THAT NOTE?

22 **MR. KENNERLY:** NO, THERE IS NOT, YOUR HONOR. THAT IS  
23 IT FROM THE PLAINTIFF.

24 **THE COURT:** WELL, WE'RE PICKING ON MERCK, IT SOUNDS  
25 LIKE, SO, MS. REYES, MAYBE I SHOULD TURN TO YOU FIRST.

1           **MS. REYES:** YES, YOUR HONOR. GOOD MORNING. THANK  
2 YOU. I AM ACTUALLY GOING TO SPEAK ON BEHALF OF ALL DEFENDANTS  
3 TODAY, UNLESS THEY HAVE OTHER THINGS TO ADD AFTER I'M FINISHED,  
4 IF THAT'S OKAY WITH YOU.

5           **THE COURT:** OKAY. SURE.

6           **MS. REYES:** I'M GOING TO TAKE UP THE POINT THAT WAS  
7 JUST ARTICULATED IN TURN. FIRST OF ALL, WITH RESPECT TO WHAT  
8 PLAINTIFFS WANT DEFENDANTS TO DO, I THINK THE ISSUE HERE IS  
9 THAT PLAINTIFFS ARE CONFUSING THREE DIFFERENT TYPES OF  
10 DISCOVERY. THERE ARE DOCUMENT REQUESTS, THERE ARE  
11 INTERROGATORIES, AND THERE ARE DEPOSITIONS. AND THERE ARE  
12 DIFFERENT REQUIREMENTS FOR EACH TYPE OF DISCOVERY REQUEST.

13           WITH RESPECT TO THE DOCUMENT REQUESTS, THEY HAVE NOT  
14 IDENTIFIED CATEGORIES OF DOCUMENTS THAT ARE MISSING. TO THE  
15 EXTENT THAT THEY SAY THAT WE HAVE TO GO TO OUR EMPLOYEES AND  
16 ASK THEM WHERE INFORMATION IS, THAT IS THE RESPONSE FOR  
17 INTERROGATORY REQUESTS. SO THE QUESTION IS: DO THEY HAVE  
18 APPROPRIATE INTERROGATORY REQUESTS TO THE DEFENDANTS THAT WOULD  
19 REQUIRE DEFENDANTS TO GO DO THAT? AND THEY DO NOT.

20           THEY HAVE IDENTIFIED TWO DOCUMENT REQUESTS TO YOU --  
21 TWO INTERROGATORIES TO YOU. NUMBER 25, WHICH THE DEFENDANTS  
22 ANSWERED; AND NUMBER 26, WHICH IS BASICALLY ASKING FOR ALL ORAL  
23 AND WRITTEN COMMUNICATIONS WITH RESPECT TO WHETHER THE DRUG  
24 CAUSED PANCREATIC CANCER. THAT IS ONE INTERROGATORY. IT  
25 COVERS YEARS' WORTH OF COMMUNICATIONS. IT COVERED POTENTIALLY



1 THOUSANDS OF COMMUNICATIONS, IF NOT MORE. WE WOULD HAVE TO ASK  
2 HUNDREDS OF EMPLOYEES IN ORDER TO ANSWER THAT INTERROGATORY.  
3 THAT IS THE TYPE OF INTERROGATORY THAT HAS REPEATEDLY BEEN HELD  
4 TO BE INAPPROPRIATE AND NOT ENFORCED BY COURTS.

5 WITH RESPECT TO THE DOCUMENT REQUESTS, WE HAVE  
6 PRODUCED TO THEM DOCUMENTS THAT ARE KEPT IN THE ORDINARY COURSE  
7 OF BUSINESS. COURTS HAVE MADE CLEAR THAT IN THIS ERA OF  
8 ELECTRONIC DISCOVERY, DOCUMENTS ARE PRODUCED AS THEY ARE KEPT  
9 IN THE ORDINARY COURSE OF BUSINESS IF THEY ARE PRODUCED WITH  
10 APPROPRIATE IDENTIFYING INFORMATION. WE HAVE DONE THAT.

11 THE DEFENDANTS HAVE FOLLOWED THE ESI PROTOCOL ENTERED  
12 INTO BY JUDGE DEMBIN TO THE T. AND THERE IS NO ARGUMENT BY  
13 PLAINTIFFS THAT WE HAVE NOT.

14 THEY HAVE INDICES OF OUR CUSTODIANS OF THE TO, FROM,  
15 CC, FILE PATH, ETC. THOSE DOCUMENTS ARE FULLY SEARCHABLE BY  
16 THE PLAINTIFFS. BECAUSE WE HAVE PRODUCED THEM IN THAT MANNER  
17 AS THEY ARE KEPT IN THE ORDINARY COURSE OF BUSINESS, RULE 34  
18 DOES NOT REQUIRE US TO DO WHAT PLAINTIFFS NOW DEMAND, THAT WE  
19 IDENTIFY SPECIFIC DOCUMENTS WITH RESPECT TO SPECIFIC REQUESTS.

20 AND TO THE EXTENT THAT PLAINTIFFS WANT MORE  
21 INFORMATION FROM EMPLOYEES, THEY ARE GOING TO GET DEPOSITIONS  
22 OF THE EMPLOYEES AND THEY CAN ASK THE QUESTIONS DURING THOSE  
23 DEPOSITIONS.

24 WITH RESPECT TO MISSING DOCUMENTS AND THE RISK/SAFETY  
25 ANALYSIS OR IN THE COMMITTEE MEETINGS, WE HAVE PRODUCED TO THEM

1 THE MEETINGS FROM THE -- THE DOCUMENTS FROM OUR SHAREPOINT  
2 SITE. THIS IS WHERE WE WERE TOLD THE DOCUMENTS WOULD BE  
3 HOUSED. WE COLLECTED FROM THERE AND WE GAVE THEM TO  
4 PLAINTIFFS. AND PLAINTIFFS DON'T HAVE TO SPECULATE THAT THAT  
5 IS WHERE WE WENT; WE TOLD PLAINTIFFS PRECISELY THAT THAT'S  
6 WHERE WE WENT.

7 BUT WE DID NOT ONLY DO THAT. WE ALSO PRODUCED FROM  
8 CUSTODIANS, WHO ARE MEMBERS OF THOSE COMMITTEES, TO ALSO HAVE  
9 THEIR CUSTODIAL FILES, WITH ANY OTHER DOCUMENTS THAT MIGHT BE  
10 INVOLVED.

11 WITH RESPECT TO THE MINUTES, THE COMMITTEES WORKED BY  
12 AGENDA AT MERCK. SO WHAT THEY DO HAVE ARE AGENDAS OF THOSE  
13 COMMITTEES. AND I'M SURE PLAINTIFFS HAVE REVIEWED THOSE  
14 AGENDAS.

15 WITH RESPECT TO THE POOLED SAFETY ANALYSIS, THIS IS  
16 THE FIRST I'M HEARING ABOUT ANY ISSUE WITH THIS. AND I WILL  
17 SAY THE FOLLOWING: THAT THIS IS A GOOD EXAMPLE OF THE FACT  
18 THAT WHEN PLAINTIFFS RAISE SPECIFIC ISSUES, WE HAVE GONE BACK  
19 AND WE HAVE TRIED TO BE VERY DILIGENT IN GOING BACK AND FINDING  
20 FOR THEM THE CATEGORIES OF DOCUMENTS THAT THEY WANT.

21 WHAT I DO KNOW IS THAT THOSE POOLED ANALYSES WOULD BE  
22 PART OF RAW DATA THAT WE ARE SEPARATELY MEETING AND CONFERRING  
23 WITH. THE PLAINTIFFS HAVE NOT ASKED TO MEET AND CONFER ON  
24 THOSE ISSUES UNTIL THE LAST COUPLE OF WEEKS. WE HAVE BEEN VERY  
25 RESPONSIVE. WE HAVE MET AND CONFERRED WHEN THEY WANTED TO. WE

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1 HAVE AGREED TO PRODUCE DATA TO THEM AND MAKE IT AVAILABLE FOR  
2 INSPECTION, AND WE ARE WORKING THROUGH WITH OTHER PLAINTIFF  
3 COUNSEL TO MAKE THAT HAPPEN.

4 AND THEN FINALLY, WITH RESPECT TO THE ISSUE WITH  
5 RESPECT TO THE SPREADSHEET, AND THEY CLAIM NOW THAT WE HAVEN'T  
6 IDENTIFIED FOR THEM WHICH STUDIES RELATE TO PANCREATIC CANCER.  
7 THE FIRST I RECEIVED THAT REQUEST WAS TWO WEEKS AGO, ON A MEET  
8 AND CONFER WITH RESPECT TO THE RAW DATA. IT WAS A MEET AND  
9 CONFER I HAD WITH DIFFERENT PLAINTIFF COUNSEL. THEY ASKED FOR  
10 THAT. WE'LL AGREE TO PROVIDE THAT FOR THEM. WE'LL AGREE TO  
11 PROVIDE FOR THEM STUDIES IN WHICH THERE WERE ADVERSE EVENT  
12 REPORTS OF PANCREATIC CANCER EVENTS.

13 WE DON'T THINK THAT THAT IS A PROPER STATISTICAL  
14 ANALYSIS TO DO BECAUSE YOU HAVE TO DO THE STATISTICAL ANALYSIS  
15 ACROSS ALL STUDIES, NOT JUST THOSE IN WHICH PANCREATIC CANCER  
16 EVENTS OCCURRED. BUT I DO THINK THIS IS ANOTHER INSTANCE IN  
17 WHICH WHEN THE PLAINTIFFS ASK US FOR SPECIFIC TYPES OF  
18 DOCUMENTS, WE TRY TO BE RESPONSIVE. AND THERE ARE A NUMBER OF  
19 ISSUES THAT HAVE BEEN RAISED FOR THE FIRST TIME ON THIS CALL  
20 THAT ARE PART OF SEPARATE MEET AND CONFERS THAT ARE ONGOING AT  
21 THIS TIME.

22 SO I THINK WITH RESPECT TO WHAT THE DECISION IS FOR  
23 THE COURT, SO FAR AS I UNDERSTAND IT, IS, ONE, ARE DEFENDANTS  
24 OBLIGATED, IN RESPECT TO THEIR DOCUMENT REQUESTS, TO IDENTIFY  
25 WHICH DOCUMENT GOES WITH WHICH REQUEST? AND THE ANSWER IS NO,

1 BECAUSE RULE 34 PERMITS DEFENDANTS TO PRODUCE THE DOCUMENTS IF  
2 THEY ARE KEPT IN THE ORDINARY COURSE OF BUSINESS.

3 WITH RESPECT TO THE TWO INTERROGATORIES AT ISSUE, 25  
4 AND 26, THEY HAVE NOT IDENTIFIED ANY ISSUES WITH 25 IN THEIR  
5 MOTION PROFFER, AND ON THAT BASIS IT SHOULD BE DENIED.

6 WITH RESPECT TO 26, THAT IT'S JUST TOO BROAD, ASKING  
7 FOR ALL WRITTEN AND ORAL COMMUNICATIONS.

8 **THE COURT:** WHY WEREN'T THE SPREADSHEETS PART OF THE  
9 INITIAL PRODUCTION WITH REGARD TO THE INFORMATION RELATED TO  
10 CAUSE? I UNDERSTAND YOU'RE NOW GOING TO PRODUCE THEM, BUT WHY  
11 WEREN'T THEY THERE IN THE FIRST INSTANCE?

12 **MS. REYES:** WE PRODUCED THE SPREADSHEETS IN THE FIRST  
13 INSTANCE, YOUR HONOR. WE CREATED THE SPREADSHEETS FOR THE  
14 PLAINTIFFS AS PART OF THE INITIAL INTERROGATORY RESPONSES.  
15 THEY'VE HAD THOSE SPREADSHEETS FOR MONTHS. THEY'VE NEVER  
16 IDENTIFIED UNTIL THE LAST TWO WEEKS THAT THEY WANTED MORE  
17 SPECIFIC INFORMATION THAN WHAT WAS PROVIDED. AND AS SOON AS  
18 THEY IDENTIFIED IT FOR US, WE AGREED TO TRY TO GO BACK AND DO  
19 THAT.

20 **THE COURT:** SO NOW YOU WILL BE PRODUCING THE RAW DATA  
21 UNDER THE SPREADSHEETS, RIGHT? I'M SORRY. I DIDN'T MEAN TO  
22 CUT YOU OFF.

23 **MS. REYES:** THERE IS AN IMMENSE AMOUNT OF RAW DATA.  
24 WHAT WE'RE TRYING TO WORK THROUGH WITH PLAINTIFF IS DO THEY  
25 WANT THE RAW DATA FOR EVERY STUDY, IN WHICH CASE THAT WOULD BE

1 AN IMMENSE AMOUNT AND THEY WOULD HAVE TO INSPECT IT AT THE  
2 DEFENDANTS' HEADQUARTERS. OR ARE THERE SPECIFIC STUDIES FOR  
3 WHICH THEY WANT RAW DATA, IN WHICH CASE WE'LL PRODUCE THAT  
4 SPECIFIC RAW DATA. BUT WE HAVE HAD THAT OFFER ON THE TABLE  
5 SINCE MAY, YOUR HONOR.

6 **THE COURT:** OKAY. THAT MAY BE, BUT THE QUESTION YOU  
7 HAVE ANSWERED IS THAT YOU'RE WORKING WITH PLAINTIFFS ON THAT.

8 AND I DON'T KNOW THAT WE HAVE COVERED SPECIFICALLY  
9 THE STATISTICAL ANALYSIS REPORTS, THEIR APPARENT LACK OF  
10 EXISTENCE, FROM THE PLAINTIFFS' VIEW OF THE DATA. ARE THEY IN  
11 THIS SHAREPOINT MATERIAL THAT HAS BEEN PROVIDED, THE  
12 STATISTICAL ANALYSIS REPORTS THAT WOULD HAVE BEEN THE  
13 UNDERLYING -- OR I GUESS THE WORK PRODUCT OF THE POOLED SAFETY  
14 ANALYSIS?

15 **MS. REYES:** YOUR HONOR, THIS IS THE FIRST TIME  
16 HEARING ABOUT IT. BUT I CAN SAY THE FOLLOWING: THEY WILL NOT  
17 BE IN THE SHAREPOINT SITE. I UNDERSTAND THAT THEY WILL BE IN  
18 THE RAW DATA ANALYSIS. AND CERTAINLY, TO THE EXTENT THAT THEY  
19 THINK THEY ARE MISSING INFORMATION, I WILL TRY TO TRACK THAT  
20 DOWN FOR THEM.

21 **THE COURT:** OKAY. ALL RIGHT. AND THEN FORGIVE ME  
22 BUT THERE WAS A POINT THREE ABOUT YOUR PAGE FOUR RESPONSE AND  
23 LOU ANN EADER. AND THAT IS PART OF THIS RAW DATA UNDER THE  
24 SPREADSHEET DISCUSSION, AS WELL, AS FAR AS YOU UNDERSTAND IT,  
25 MS. REYES?

1           **MS. REYES:** WELL, I'M NOT SURE WHAT THE CONCERN IS.  
2           BASICALLY, THEY ARE SAYING THERE IS AN INTERROGATORY AND MERCK  
3           RESPONDED TO IT. AND THAT'S WHAT WE DID. AND THIS IDEA THAT  
4           THEY DIDN'T HAVE THIS UNTIL JUNE I DON'T THINK IS CORRECT. WE  
5           PRODUCED DOCUMENTS AS THE COURT ORDERED THEM. WE PRODUCED  
6           INTERROGATORY RESPONSES IN MAY. WE MET AND CONFERRED WITH  
7           PLAINTIFF ON SOME OF THEM. WE REVISED SOME OF THEM. AND THEN  
8           WE PRODUCED DOCUMENTS THAT WE WERE ORDERED TO, MEETING ALL THE  
9           DEADLINES.

10          **THE COURT:** OKAY. AND MY ASSUMPTION IS THAT UNDER  
11          RULE 26(G), ALL OF THE INTERROGATORY RESPONSES OR DOCUMENT  
12          REQUESTS WERE VERIFIED OR SIGNED OFF ON BY COUNSEL OR THE PARTY  
13          AS TO THE REASONABLE INQUIRY AND THE COMPLETENESS. IS THAT  
14          TRUE AS FAR AS MERCK IS CONCERNED?

15          **MS. REYES:** YES. CERTAINLY, YOUR HONOR.

16          **THE COURT:** AND LILLY, AS WELL?

17          **MR. KING:** YES, YOUR HONOR.

18          **THE COURT:** AND NOVO NORDISK, TRUE FOR THEM?

19          **MS. LEVINE:** NOVO NORDISK. YES, YOUR HONOR.

20          **THE COURT:** AND AMYLIN?

21          **MS. LAURENDEAU:** YES, YOUR HONOR.

22          **THE COURT:** OKAY. ALL RIGHT. ANY OF THE OTHER  
23          DEFENSE COUNSEL WANT TO SAY ANYTHING TO SUPPLEMENT WHAT  
24          MS. REYES HAS ADVISED?

25                 IF NOT, PLAINTIFF, ANY FINAL WORD? MR. KENNERLY, OR

1 OTHERS ON THIS?

2 **MR. KENNERLY:** YES, YOUR HONOR.

3 **THE COURT:** GO AHEAD.

4 **MR. KENNERLY:** THIS IS MR. KENNERLY, AGAIN. JUST A  
5 FEW POINTS TO COVER. ONE OF THEM IS ABOUT SPREADSHEETS. THERE  
6 IS MULTIPLE SPREADSHEETS TO TALK ABOUT HERE. THE ONE THAT  
7 DEFENSE COUNSEL IS REFERENCING, THAT THEY GAVE US SOME TIME  
8 AGO, IS THE SPREADSHEET OF STUDIES CONDUCTED ON THE DRUGS. AND  
9 THAT'S THE ONE WHERE WE ARE CONTINUING TO MEET AND CONFER, THE  
10 RAW DATA WE WANT FROM WHICH STUDIES.

11 NOW, WE HAVE REQUESTED ALL. THEY SAID NO. WE HAD A  
12 MEET AND CONFER BACK AND FORTH. WE'VE HAD OUR EXPERTS LOOKING  
13 AT WHICH ONES THEY WANT. SO THAT IS STILL PART OF THE MEET AND  
14 CONFER.

15 BUT THERE ARE DIFFERENT SPREADSHEETS THAT HAVE BEEN  
16 DISCUSSED HERE. AND THIS ISN'T THE MOTION FOR IT, BUT I DON'T  
17 WANT TO HAVE THE COURT HAVE A MISUNDERSTANDING OF IT. SOME OF  
18 WHAT WE REQUESTED IS IDENTIFIABLE PANCREATIC CANCER CASES IN  
19 YOUR CLINICAL TRIALS. THE DEFENDANTS HAVE ALL SAID THEY WILL  
20 ABSOLUTELY NOT DO THAT.

21 WE HAVE FOUND, THROUGH SOME FISHING THROUGH THESE  
22 DOCUMENTS, SOME BARING OF THIS. THEY ARE NEVER IN THE ORIGINAL  
23 NATIVE FORMAT THEY WERE STORED IN. THEY USUALLY HAVE SCANS OF  
24 IT. BUT WE DON'T HAVE THAT AT ALL. AND THE DEFENDANTS HAVE  
25 OBJECTED TO GIVING US ANYTHING LIKE THAT. THEY HAVE OBJECTED

1 TO GIVING US ANY SPREADSHEET ABOUT ADVERSE EVENTS, EITHER.  
2 THAT IS THE SUBJECT OF OUR MOTION. SO I DON'T WANT THE COURT  
3 TO MISUNDERSTAND WHICH SPREADSHEETS ARE DISCUSSED. THERE ARE  
4 MULTIPLE ONES OUT THERE BEING DISCUSSED BACK AND FORTH.

5 **THE COURT:** RIGHT. I WAS FOCUSING -- AND I  
6 APPRECIATE YOUR COMMENTS. WE'RE FOCUSING ON THE ONES THAT ARE  
7 RESPONSIVE TO THE INTERROGATORIES OR DOCUMENT REQUESTS THAT ARE  
8 THE SUBJECT OF THE MOTION. THERE MAY WELL BE OTHERS, AND I  
9 ACKNOWLEDGE THAT.

10 ANYTHING ELSE, THEN?

11 **MR. KENNERLY:** YES, VERY BRIEFLY. THE POOLED  
12 ANALYSIS EVALUATIONS -- AND I'M A LITTLE LOST ON HOW AN  
13 EVALUATION OF STATISTICAL DATA COULD BE RAW DATA, BUT THIS IS A  
14 BIGGER GLOBAL POINT HERE. WHICH IS, YOU KNOW, THESE ARE THINGS  
15 THAT WHEN WE DIVED THROUGH, BACK AND FORTH, WE WERE ABLE TO  
16 LOCATE AND THEN HAD AN ISSUE WITH IT. WHEREAS IF YOU PRESENTED  
17 THESE QUESTIONS -- HAVEN'T YOU BEEN ANALYZING A CAUSAL LINK --  
18 YOUR SCIENTIST AT MERCK WILL COME BACK AND SAY, WELL, HERE IS  
19 THE POOLED SAFETY ANALYSIS, HERE IS THE EVALUATION OF THE  
20 STATISTICAL DATA. AND THE RESPONSE THE DEFENDANTS GAVE IS  
21 REALLY THE SUM TOTAL OF THIS MOTION.

22 THE RESPONSE THAT THE DEFENDANTS GAVE IS WELL, WE DID  
23 ESI SEARCHES ON CUSTODIANS, AND WE PULLED SOME STUFF FROM  
24 SHAREPOINT. AND PLAINTIFFS' POSITION IS THAT'S OKAY FOR ESI.  
25 IT'S NOT OKAY FOR INTERROGATORIES AND REQUESTS FOR DOCUMENTS.



1 INTERROGATORIES AND REQUESTS FOR DOCUMENTS REQUIRE YOU GO AND  
2 SPEAK WITH THE AGENT, YOU LOOK AT THE AGENT'S KNOWLEDGE. THAT  
3 IS THE REASONABLE INVESTIGATION. THE IDEA THAT THIS IS  
4 HUNDREDS OF EMPLOYEES WHO WOULD BE ASSESSING THE CAUSAL LINK  
5 BETWEEN JANUVIA AND PANCREATIC CANCER -- IT'S NOT. IT'S GOING  
6 TO BE, AT MOST, A DOZEN, MAYBE 20 OF THEM. SIMPLY ASK THEM:  
7 WHAT CRITERIA DO YOU USE, WHAT DOCUMENTS DO HAVE REFLECTING IT?

8 AND AGAIN, WE DON'T HAVE ANY OF THAT. OR IF WE DO  
9 HAVE IT, WE HAVE IT BURIED SOMEWHERE. WHEREAS IF I WALKED INTO  
10 MERCK'S OFFICE AND SAID HOW HAVE YOU BEEN ANALYZING THE  
11 EPIDEMIOLOGY, SOMEONE COULD TAKE ME RIGHT TO THESE DOCUMENTS.  
12 THEY COULD TAKE ME RIGHT TO THESE AGENDA NOTES OR MINUTES. WE  
13 CAN'T FIND EITHER OF THOSE. THEY COULD TAKE ME RIGHT TO THE  
14 STATISTICAL ANALYSES. AND THAT WOULD BE THAT.

15 SO THAT IS WHAT WE'RE ASKING. AND THIS IS WHY WE'RE  
16 HOPING TO GET DIRECTION FOR THE FUTURE. THE DEFENDANTS'  
17 POSITION IS THE CUSTODIAL SEARCH IS GOOD ENOUGH. RUN THE ESI  
18 PROTOCOL AND YOU'RE DONE. OUR VIEW IS YOU STILL NEED TO GO  
19 TALK TO THE EMPLOYEES, RELATE BACK WHAT THEY SAID, IDENTIFY THE  
20 DOCUMENTS THEY IDENTIFIED AS RESPONSES.

21 **THE COURT:** SO IT SOUNDS LIKE WHAT YOU'RE SAYING IS  
22 YOU WANT DETAILS AS TO WHAT THEY DID IN ORDER TO RESPOND TO THE  
23 INTERROGATORIES -- WHO THEY SPOKE TO AND SO FORTH, WHAT FILES  
24 THEY SEARCHED OR DIDN'T SEARCH?

25 **MR. KENNERLY:** THAT WOULD BE PART OF IT. IF THEY'RE

1 RESPONDING TO REQUESTS FOR DOCUMENTS WITH SOME DOCUMENTS, WELL,  
2 WHERE DID THESE COME FROM? IS IT THE ESI SEARCH, IS IT THE  
3 SHAREPOINT? BUT AN ADDITIONAL ISSUE IS DID SOMEONE IDENTIFY  
4 THIS AS RELEVANT? WHO DID YOU TALK TO?

5 AND THE ANSWERS THAT WE GOT BACK DON'T INDICATE  
6 ANYONE WAS TALKED TO. THEY OBJECT: LOOK, WE'VE GIVEN YOU THE  
7 ESI SEARCHES AND THE CUSTODIAN FILES AND THAT'S IT. FULL STOP.

8 SO THE FIRST TIME WE'RE GONNA KNOW WHAT, FOR EXAMPLE,  
9 LOU ANN EADER -- WHAT COMMUNICATIONS SHE KNOWS OF, THIS IS  
10 GOING TO BE DURING HER DEPOSITION. AND AS TO THE  
11 EPIDEMIOLOGIST AT MERCK, THE FIRST TIME WE'RE GOING TO ASK THEM  
12 WHAT ANALYSES HAVE YOU PERFORMED, THE FIRST TIME WE'LL HAVE AN  
13 ANSWER IS WHEN IT'S DURING THEIR DEPOSITION. AND THIS IS  
14 READILY AVAILABLE TO THE COMPANY, JUST TO ASK THEIR EMPLOYEES  
15 WHAT HAVE YOU DONE, AND THEY CAN POINT TO IT.

16 **THE COURT:** AND I UNDERSTAND THAT. BUT I THINK  
17 INTERROGATORY 26 IS WAY OVERBROAD IN ITS APPROACH TO THE ANY  
18 AND ALL, CONTRARY TO SOME OF THE DOCUMENT REQUESTS THAT DO GET  
19 MORE SPECIFIC TO CAUSALLY-RELATED DOCUMENTS AND SO FORTH.

20 BUT YOU ARE ASKING FOR A WIDE UNIVERSE THAT COULD --  
21 I THINK SOMEBODY DESCRIBED -- INCLUDE POST-ITS AND OTHER  
22 THINGS. AND THE FOCUS OF THE DISCOVERY AT THIS STAGE OF THE  
23 CASE -- TO GO BACK IN TIME TO SOME OF OUR EARLIER  
24 CONVERSATIONS -- WAS TO LOOK AT THE SCIENTIFIC DATA. AND THIS  
25 ANECDOTAL NOTE OR COMMUNICATION IS WAY BEYOND THE SCOPE THAT

1 THE COURT HAS NARROWLY CRAFTED TO DATE.

2 SO I DO FIND INTERROGATORY 26 OVERBROAD, DESPITE THAT  
3 THERE IS RESPONSES FROM A VARIETY OF THE DEFENDANTS, CITING TO  
4 BATES DOCUMENTS, CUSTODIAL FILES, AND SO FORTH. AND TO SOME  
5 DEGREE THE PLAINTIFFS DO HAVE TO GO THROUGH AND ANALYZE THE  
6 DATA, AS THEY WOULD IN ANY EVENT.

7 THE KEY HERE, I BELIEVE, IS THAT WHAT YOU'RE ASKING  
8 FOR, IN LARGE PART, IS THE WORK PRODUCT OR THE  
9 BEHIND-THE-SCENES EFFORTS OF COUNSEL. THEY HAVE CERTIFIED  
10 THEY'VE MADE REASONABLE INQUIRY. THAT IS WHAT RULE 26(G)  
11 REQUIRES, AND THEY APPEAR TO HAVE MET THAT.

12 SHOULD THE LATER DEVELOPMENTS IN THE CASE SHOW THAT  
13 THEY WERE NOT IN EARNEST IN THOSE CERTIFICATIONS OF THE  
14 PRODUCTIONS, THEN THAT WOULD BE A CAUSE TO LOOK AT THE  
15 ASSESSMENT OF SANCTIONS, COST-SHIFTING OR SOMETHING, FOR A  
16 FAILURE TO HAVE APPROPRIATELY DONE SO.

17 BUT THE COURTS NEVER REQUIRE A DUE DILIGENCE  
18 COMPONENT TO THE RESPONSE. WE TAKE COUNSEL AT THEIR WORD THAT  
19 THE PROCESS HAS BEEN COMPLETE AND REASONABLE. AND WHERE  
20 EVIDENCE TO THE CONTRARY SURFACES, THEN WE'LL GET INTO THAT  
21 INQUIRY.

22 I DISAGREE WITH THE PLAINTIFFS' ANALYSIS THAT THE  
23 DEFENDANTS' RESPONSES TO INTERROGATORIES -- OR RESPONSES TO  
24 REQUESTS FOR PRODUCTION VIOLATE THE SPIRIT OR THE LETTER OF RULE  
25 34. INDEED, THESE DOCUMENTS PURPORT TO HAVE BEEN PRODUCED AS

1 THEY ARE KEPT IN THE NORMAL COURSE OF BUSINESS, AND THAT IS  
2 ALTERNATIVE NUMBER TWO. IF YOU READ RULE 34, AS I'M SURE YOU  
3 ALL HAVE, THEY DON'T NEED TO IDENTIFY.

4 BUT AS I LOOK THROUGH THE VARIOUS RESPONSES FROM THE  
5 EXHIBITS THAT WERE PRODUCED BY THE PLAINTIFFS, THERE IS A LOT  
6 OF REFERENCE TO EITHER PARTICULAR CUSTODIANS OR PARTICULAR  
7 BATES-STAMPED DOCUMENTS. AND THE TYPE OF SPECIFICITY REQUIRED  
8 TO MEET THE SPIRIT, AS WELL AS THE LETTER OF THE LAW, EXISTS.

9 NOW, YOU'VE GOT ISSUES WITH REGARD TO EITHER  
10 SOMETHING THAT CAN'T BE LOCATED, SOMETHING DISCRETE -- FOR  
11 INSTANCE, THIS DISCUSSION ABOUT THE MINUTES OF THE TEAM WHICH  
12 WE NOW LEARN ARE REALLY AGENDAS. IF YOU CAN'T FIND THE  
13 AGENDAS, CALL COUNSEL. THEY CERTAINLY WOULD BE PROFESSIONAL  
14 ENOUGH TO SAY WHERE THEY ARE OR DOUBLECHECK TO MAKE SURE YOU  
15 HAVE GOT THEM.

16 A LOT OF THIS STATISTICAL ANALYSIS DEBATE AND THE  
17 SPREADSHEET ISSUE SEEMS TO BE SOMETHING STILL IN PLAY AS IT  
18 GOES NOT TO THE STATISTICAL ANALYSIS OF THE SPREADSHEET SO MUCH  
19 AS THE RAW DATA THAT UNDERLIES IT. WHICH, I THINK, WOULD  
20 BENEFIT FROM SOME PROPORTIONALITY ANALYSIS BETWEEN THE SIDES,  
21 PERHAPS EVEN AN APPROACH BY WAY OF SAMPLING, TO THE EXTENT THAT  
22 THERE IS A HUGE MOUNTAIN OF DATA, WHICH COST AND TIME MAY NOT  
23 YIELD A GREAT DEAL OF BENEFIT. SO I URGE YOU TO CONSIDER MAYBE  
24 SAMPLING OR SOME LIMITED INITIAL PRODUCTION IN THE INTEREST OF  
25 SEEING IF IT'S WORTH DOING THE WHOLE NINE YARDS HERE.

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1           BUT ON ITS FACE I'M GOING TO DENY THE MOTION TO  
2 COMPEL, FINDING INTERROGATORY 26 OVERBROAD, FINDING THERE BEING  
3 APPROPRIATE COMPLIANCE UNDER RULE 33 IN RESPONDING TO  
4 INTERROGATORY 25, FINDING COMPLIANCE BY PRODUCING THE DOCUMENTS  
5 AND CERTIFYING THEM AS COMPLETE. EVEN THOUGH THEY REFER TO  
6 OTHER DATA, THAT IS FULLY CONTEMPLATED NOT ONLY IN THE  
7 ELECTRONIC AGE -- AND I'M ONLY LOOKING AT THE RULES. THE ESI  
8 PROTOCOL IS CERTAINLY APPROPRIATE AS IT GOES TO FORMAT AND  
9 OTHER PARTICULARS OF THE ESI CONSTRUCT. BUT IN TERMS OF  
10 MEETING THE LETTER OF RULE 34, I FIND THE DEFENDANTS HAVE.

11           SO THE MOTION TO COMPEL IS DENIED. AND WE'LL  
12 CERTAINLY UNDERTAKE TO DISCUSS THE RAW DATA ISSUE AFTER YOU  
13 HAVE COMPLETED THE PROCESS ON THAT, AND THESE OTHER ISSUES  
14 WHICH ARE PENDING IN OTHER MATTERS.

15           SO I'M DENYING THE MOTIONS. AND TURN YOU BACK TO  
16 YOUR OWN DEVICES TO CONTINUE TO MEET AND CONFER, WITH THE IDEA  
17 THAT WE'LL BE TALKING ON STATUS, I THINK, NEXT WEEK; AND THE  
18 WEEK AFTER, WE HAVE ANOTHER ONE OF THESE ON SOME MORE DISCRETE  
19 ISSUES OF THE DATA THAT IS THE CENTER OF THE CASE.

20           SO THAT IS HOW I'LL LEAVE IT WITH YOU FOR TODAY. AND  
21 I HAVE TO RUN TO ANOTHER HEARING, SO I'M GOING TO TURN YOU  
22 LOOSE AND WE'LL TALK TO YOU NEXT WEEK. SO THANKS VERY MUCH.

23  
24  
25  
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